(2)

No. 06-1333

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IN THE

Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

v.

MARK K. SACHS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner's version of the Question Presented is incorrect. It seeks to bootstrap an *additional* argument onto the Question presented in *Florida v. Harden*, No. 06-770, which the parties have consistently stipulated is controlling—and as to which this Court denied certiorari on April 23, 2007.[1] The Question Presented in *Harden* is actually:

> "Is The Florida Anti-Kickback Statute, § 409.920(2)(e), Florida Statutes (2000) Preempted by the Federal Anti-Kickback Statute 42 U.S.C., § 1320a-7b(b)(2) (2000), Since: (1) The Federal Statute Contains a 'Knowing and Willful' *Mens Rea* Requirement That is Not Part of The Florida Statute, and (2) The Federal Statute Contains 'Safe Harbor' Provision Not Present in The Florida Statutory Scheme?"

Onto the Question it has—at the State trial, intermediate appellate and Supreme Court levels—stipulated is controlling, Petitioner seeks to add the following argument:

> "1. Whether persons who receive remuneration for providing services or referrals for which

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1. As stated in the opinion for which the State now seeks review:

> "We have for review *State v. Sachs*, in which the Third District Court of Appeal affirmed the trial court's ruling *based upon the parties' stipulation at the trial level as to the controlling effect of State v. Harden*."

State v. Harden, 948 So.2 723, 724 (Fla. 2007) (emphasis added) (citations omitted). The Florida Supreme Court's opinion does not address the first issue Petitioner raises.

> payment is not made under Medicaid fall within the federal employee safe harbor provision."

State's Petition at 1.

As the above question was never adjudicated in the court below, this Court should not pass upon it for the first time today. The facts underlying such a question were never fully developed, argued or adjudicated in the courts below and it should not be entertained for the first time at this late date. The only Question Presented in this case is that stipulated to from its genesis and quoted at the top of this page.

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ARGUMENT

Proceedings Below

The Respondent, Mark K. Sachs, is a licensed physician. The State alleged that between May 1 and November 6, 1997, Dr. Sachs was paid for prescriptions he referred to be filled which were ultimately paid for by Medicaid.

Though Dr. Sachs' only conduct was receiving remuneration for referring patients, Petitioner filed criminal charges under § 409.920(2)(e), Florida Statutes, characterizing his actions as a "scheme." Dr. Sachs never admitted participating in a scheme, or that any scheme existed—much less a scheme to violate state or federal law.

Dr. Sachs filed a motion to dismiss in the trial court pursuant to Rule 3.190, Florida Rules of Criminal Procedure, which provides a procedural mechanism for a defendant to state constitutional grounds for dismissal and, based upon those constitutional grounds, to establish the absence of a *prima facie* case of guilt. Prior to Dr. Sachs' motion to dismiss, in an a unanimous decision, Florida's Third District Court of Appeal held a trial court correctly dismissed similar criminal charges, *State v. Harden,* 873 So.2d 352 (Fla. 3d DCA 2004), finding implied conflict preemption as Florida's Statute conflicted with federal law in two significant ways:

- 1. The federal statute contained several so-called "safe harbor" provisions that exclude certain types of payments from being considered "illegal remuneration". 42 U.S.C. § 1320(a)-7b(b)(3)(B) (2000). Specifically, 42 U.S.C. § 1320a-7b(b)(3)(B) (2000) protected employer/

employee payments for the provision of covered items or services from criminal prosecution. The Florida statute had no such "safe harbor" provisions.

2. The Federal Anti-Kickback Statute contained a "knowing and willful" *mens rea* requirement. Under the federal statute, "in order to establish a 'willful' violation of the statute, the government must prove that a defendant acted with knowledge that his conduct was unlawful", citing *Bryan v. United States,* 524 U.S. 184, 192 (1998). In contrast, the Florida statute only required that the defendant act "knowingly". By definition, the Florida statute included "mere negligent" conduct, an activity the federal statute intended to protect.

Thus, Florida's intermediate appellate court held F.S. 409.920(2)(e) unconstitutional as applied under the Supremacy Clause, Article VI, Clause 2 of the United States Constitution. The court also held a second aspect of Florida's Medicaid Fraud Statute, the *mens rea* requirement in F.S. § 409.920(1)(d), was preempted by federal law and unconstitutional on its face under the Supremacy Clause.

Following the Florida trial and appellate courts' unanimous holdings set forth in the opinion of Florida's Third District Court of Appeal in *State v. Harden,* 873 So.2d 352 (Fla. 3d DCA 2004), the trial court granted Dr. Sachs' motion to dismiss, finding the State's prosecution was preempted by both an express provision of the Federal Medicaid Act, 42 U.S.C. § 1320a-7b(b)(3)(B), and a parallel administrative "safe harbor" provision, 42 C.F.R. § 1001 952(i). The

criminal information against Dr. Sachs was dismissed and, as in *Harden*, Petitioner sought review in the state Supreme Court.

Florida Supreme Court Decision in *Harden*

Florida's Supreme Court unanimously held the "anti-kickback" provision of Florida Statute 409.920(2)(e), conflicted with, and was thus preempted by, federal law. *State v. Harden,* 938 So.2d 480 (Fla. 2006). The court made a detailed analysis of the Federal Anti-Kickback Statute, comparing the federal statute with the Florida statutory scheme, and noting the two statutes collided in two important ways: (a) unlike the federal law, the Florida Statute had a lower *mens rea* requirement, allowing the State to charge a criminal anti-kickback violation based on behavior that was merely negligent, and (b) unlike the federal law, the Florida Statute lacked any "safe harbor" and criminalized payment for referrals. Florida's Supreme Court agreed with Florida's Third District Court of Appeal, holding § 409.920(2)(e), Florida Statutes, was preempted by federal law and thus unconstitutional under the Supremacy Clause.

As Florida's Supreme Court noted, the Florida Legislature amended the statute to conform to the federal *mens rea* standard. Ch. 2004-344, § 8 at 2392, Laws of Fla. The state statute now provides that the term "knowingly" also includes "willfully."

REASONS FOR DENYING THE PETITION

The Florida Supreme Court correctly and unanimously held Florida's own Anti-Kickback Statute conflicted with and was preempted by the federal statute, that "compliance with both federal and state regulations is a physical impossibility," and that the state law stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," citing this Court's plurality opinion in *Gade v. Nat'l. Solid Waste Management Ass'n.*, 505 U.S. 88, 89 (1992).

Preemption Law Was Properly Applied

Congress has power under Article VI, cl. 2 of the United States Constitution to preempt state law. *Gibbons v. Ogden*, 9 Wheat 1, 211 (1824); *California v. Arc America Corp.*, 490 U.S. 93, 101, 109 S.Ct. 161 (1989). States may not assert jurisdiction where Congress intended to preempt a field of law. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S.Ct. 1124 (1981).

To date, this Court has recognized at least three distinct species of preemption: (1) "express preemption," wherein a federal statute contains explicitly preemptive language; (2) "implied field preemption," where the federal regulatory scheme is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it; and (3) "implied conflict preemption," where compliance with both federal and state regulations is physically impossible, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Gade v. Nat'l Solid Waste Management Ass'n.*, 505 U.S. at 98.

Thus, even where federal law does not occupy a particular field, a state law is preempted to the extent that it conflicts with federal law. *Hines v. Davidowitz,* 312 U.S. 52, 61 S.Ct. 399 (1941). Implied conflict preemption exists when it is impossible for a private party to comply with both the state and the federal law. *See, Crosby v. National Foreign Trade Council,* 530 U.S. 363, 372, 120 S. Ct. 2288 (2000); *English v. General Electric Co.,* 496 U.S. 72, 110 S.Ct. 2270 (1990).

Florida's highest court found conflicts between Florida's own statute, both on its face and as applied, and the federal statute to such an extent that conduct made legal by federal law was made illegal under state law.

Facial Conflict - Differing *Mens Rea* Requirements

Florida's Anti-Kickback Statute had a lower *mens rea* requirement than the federal statute. The state statute defined "knowingly" as an act "done by a person who is aware or *should be aware* of the nature of his of her conduct, and that his or her conduct is substantially certain to cause the intended result". § 490.920(1)(d), Florida Statute (Emphasis added). The federal statute, in contrast, applies only to those acts that are done "knowingly and willfully."

The term "willfully" itself denotes an act which is intentional, knowing, or voluntary—as opposed to accidental. *Felton v. United States,* 96 U.S. 699 (1877). In order to establish a "willful" violation of a criminal statute, "the government must prove that the defendant acted with knowledge that his conduct was unlawful." *Ratzlaf v. United States,* 510 U.S. 135, 137, 114 S.Ct. 659 (1994); *Bryan v. United States, supra.* Under federal law, a defendant must

not only know that a statute prohibits offering or paying remuneration for referrals—but also that he or she engaged in such referrals with the specific intent to violate the law. *See, Hanlester Network v. Shalala,* 51 F.3d 1390, 1400 (9th Cir. 1995); *United States v. McClatchey,* 217 F.3d 823 (10th Cir. 2000); *Cheek v. United States,* 498 U.S. 192, 198, 111 S.Ct. 604 (1991).

Petitioner's suggestion that the different *mens rea* standards in the two statutes is "inconsequential" since they criminalize the same intentional act of making referral payments (Petition at 9) ignores basic principles of criminal law. In order to violate the federal statute, one must not only intentionally make referrals, but must also make such referrals with knowledge that doing so would be a criminal violation. Under the Florida statute, in contrast, negligent conduct alone may give rise to a criminal conviction.

Congress intended to protect individuals such as Dr. Sachs by requiring proof that he not only "knowingly and willfully" violated the statute, but also "acted with an evil-meaning mind—*i.e,,* that he acted with knowledge that his conduct was unlawful." *United States v. Starks,* 157 F.3d 833, 838 (11th Cir. 1998). The state statute at bar provided no such protection—and criminalized conduct made legal under federal law.

Congress' stated purpose for amending the Anti-Kickback Statute by adding a "knowingly and willfully" *mens rea* element was its concern that criminal penalties could be imposed under the old law where "conduct, while improper, was inadvertent." *H.R. Rep.*, 96-1167 at 59 (1980), reprinted in 1980 U.S.C.C.A.N 5526, 5572.

Safe Harbor Provisions

Unlike its federal counterpart, the state statute contains no safe harbor. Congress authorized safe harbors, 42 C.F.R. §§ 1001.952(a)-(v), to protect relatively innocuous commercial arrangements that may technically violate federal law. The 23 safe harbors are intended to guide healthcare providers in knowing which business practices are legal. One safe harbor provides an illegal remuneration (or "kickback") "does not include any amount paid by an employer to an employee, who has a *bona fide* employment relationship with an employer." 42 C.F.R. § 1001.952(i).

Dr. Sachs is protected by a federal safe harbor. His status as *bona fide* employee remains unrefuted, and *Harden* found both that a similarly situated defendant fell within the employee safe harbor and that business solicitation by employees was legal.

In support of this construction, the Florida Supreme Court's studied opinion in *State v. Harden,* 938 So.2d 480 (Fla. 2006), cited numerous decrees of the Office of the Inspector General of the Department of Health and Human Services, Medicare, and state healthcare programs: *Fraud and Abuse, O.I.G. Anti-Kickback Provisions*, 56 Fed. Reg. 35, 952 and 35, 953 (July 19, 1991); *Medicare and Medicaid Programs; Fraud and Abuse, O.I.G. Anti-Kickback Provisions*, 54 Fed. Reg. 3088, 3093 (Jan. 23, 1989).

Petitioner attempts to pigeonhole the safe harbor provision in a manner contrary to its plain meaning. The safe harbor provision in 42 C.F.R., § 1001.952(i) protects employees for the "furnishing of any item for which payment may be made in whole or part under Medicare, Medicaid or

other federal healthcare programs." The state statute, in contrast, criminalizes receiving remuneration for referring an individual for the furnishing of "any item or service for which payment may be, in whole or in part, under the Medicare Program . . . or in obtaining, purchasing, leasing, ordering or arranging . . . any goods, facility, item, or service for which payment may be made, in whole or in part, under the Medicare Program." § 409.920(2)(e), F.S. The federal safe harbor and state statute cover the same conduct. The conduct at issue is therefore either covered by the federal safe harbor or not illegal under the state statute.

Petitioner has the burden of showing there may have been error below, *Higgins v. Carr Bros. Co.*, 63 S.Ct. 337 (1943), yet cites only three opinions of this Court for two propositions: (a) that "this Court has interpreted explicit statutory provisions recognizing state authority 'to mean what they say'" (*Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996)) (Petition at 8); and (b) that "a court 'should not extend its invalidation of a statute further than necessary to dispose of the case before it.'" (*Dalton v. Little Rock Fam. Planning Serv.*, 516 U.S. 474 (1996) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985)) (Petition at 9).

The decision below does not dispute whether 42 U.S.C. § 1396b(q)(3)'s definition of "State medicaid fraud control unit" *in a federal statute dealing uniquely with a State's qualification for federal Medicare assistance* "mean what they say,"[2] and Respondent does not ask the Court to extend

2. Moreover 42 U.S.C. § 1396b(q)(3) was not intended as a grant of authority for States to *legislate* in conflict with otherwise explicit Congressional intent, but merely requires fund-receiving (Cont'd)

invalidation of the statute further than necessary to dispose of this case. What the State criminal statute says and how it was found to have been applied in this case conflict with and are preempted by federal law. Invalidation need go no further than the decision below–making certiorari unnecessary.

United States Supreme Court Decision
In State v. Harden

Finally, as the parties have repeatedly stipulated that the decisions in State v. Harden are controlling in this matter and as, this Honorable Court refused to grant certiorari in that matter on April 23, 2007, under case number 06-770, the court should likewise deny certiorari in this matter.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be DENIED.

Respectfully submitted,

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(Cont'd)

States to have an entity in place "conducting a statewide program for the investigation and prosecution of violations of all *applicable* State laws." *Id.* (Emphasis added). State laws that conflict with and are thus preempted by federal law in violation of the Supremacy Clause are hardly "applicable."